Supreme Court, U.S.
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No:_____

In the Supreme Court of the United States

October Term 1999

RICHARD BERT ALLENDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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21pp

QUESTIONS PRESENTED

Whether the United States District Court and the United States Court of Appeals for the Seventh Circuit erred in finding that the Government had adequately proven the jurisdictional element of a bank fraud conviction

Whether the United States District Court and the United States Court of Appeals for the Seventh Circuit erred in finding that the Petitioner,s Indictment set forth the jurisdictional elements on the crimes charged.

Whether the United States District Court and the United States Court of Appeals for the Seventh Circuit erred in finding that the Petitioner had effective assistance of counsel.

Whether the United States District Court and the United States Court of Appeals for the Seventh Circuit erred in finding to not hold an evidentiary hearing.

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The Petitioner, Richard B. Allender, Respectfully prays that a writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit filed in the above-entitled proceedings on September 10, 1998 and December 18, 1998.

OPINIONS BELOW

The November 4, 1998 opinion of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of the United States District Court is unreported. Copies of the district court judgment, Cause No. 96-420 C-T/F, the Court of Appeals Opinion and the March 19, 1999 Order of the Court of Appeals denying said Richard B. Allender's petition for rehearing and suggestion for rehearing en banc, Number 97-2919, are reprinted and are part of the Appendix.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was filed on November 4, 1998. An Order denying Allender's petition for rehearing and suggestion for rehearing en banc was therafter filed on March 19, 1999. This Court's jurisdiction is premised upon Title 18, United States Code, Sect, 1254(1), which provides for

review of decisions of the Courts of Appeals by Writ of Certiorari.

This Petition for Writ of Certiorari is timely filed within the ninety (90) days of the Seventh Circuit's decision, in accordance with Rules 10.1 and 13.1 of the Rules of the Supreme Court of the United States, as amended February 1, 1991.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Sect.1334.

The Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The November 4, 1998 denial, designated Petitioner's appeal as successive and it was assigned to the original panel. The prior appeals only issues were discrepancies in U.S.S.G. sections 2B1.1 and 2F1.1. This appeal was on a different set of issues and should have been assigned to a different panel of Judges.

The Petitioner states that the district court did not prove jurisdiction and therefore the Petitioner should never have been haled into court. He then served an illegal sentence in the underlying bank fraud prosecution.

The indictment was fatally defective for there was a complete omission of any allegation which might reasonably be construed to mean that the First State Bank of Morgantown, (which was a state chartered bank), was federally insured.

During trial this indictment was broadened varied and constructively amended by a AUSA Warden and Judge Tinder by leading the jury to believe that the bank was FDIC insured with absolutely no proof introduced that the bank was insured at the time of the alleged crimes.

The abundance of affidavits and documents before the court from Appellant's 28 U.S.C. Sect. 2255 motions, supplements, and prior appeal briefs did show that the Appellants trial counsel was either completely ineffective or working with the U.S. attorney's office to help convict his client, and the district court erred in failing to hold an evidentiary hearing on Appellant's claims. Also the argument on U.S.S.G. Sections 2B1.1 and 2F1.1 ruled upon, but is now moot for the Appellant has already served an illegal sentence, which should be vacated and Appellant acquitted.

REASONS RELIED UPON AND ARGUMENT IN SUPPORT OF PETITIONER'S REQUEST FOR ISSUANCE OF A WRIT OF CERTIORARI

ARGUMENT ON INSUFFICIENCY OF EVIDENCE TO ADEQUATLY PROVE THE JURRISDICTIONAL ELEMENT OF A BANK FRAUD CONVICTION

The Government lacked jurisdiction for it was not proven beyond a reasonable doubt that the First State Bank of Morgantown, which is a state chartered bank, had FDIC insurance at the time of the alleged bank fraud. Exhibit 21 trial TR at 511 was introduced to the court and not objected to by Attorney Keifer. This failure to object does not prejudice app. see U.S. v. James, 987 F.2d 648 (9th cir. 1993). There was no mention that this was an FDIC certificate which is worthless as evidence in the first place because it was 22 years old. (attached as Exhibit). In the sevevth circuit's ruling in U.S. v. Locklear, 97 F.3d 196 (7th Cir. 1996), because of lack of sufficient proof of FDIC insurance the government confessed error and asked this court to direct the District Court to enter a judgment of acquittal. Also see U.S. v. Mentz, 840 F.2d 315 (6th cir. 1998). The government produced two witnesses testifying that the bank was federally insured and produced old FDIC certificates. Also see U.S. v. Schultz, 17 F.3d 723 (5th cir. 1994) which held that to establish federal jurisdiction certificates must be presented for the actual day of the offense. Citing Schultz Supra:

> **The government introduced the testimony of two TCB - Sugar Land bank presidents. If those officials had possessed personal knowledge of the bank's insurance status their testimony that TCB - Sugar Land was insured by the FDIC during**

> the periods in question if unchallenged, would have sufficiently provided the jurisdiction issue in the case Sub Judice. ... This court has continually cautioned the government that its failure to adequately prove the jurisdiction element might one day require the reversal of bank fraud convictions. U.S. v. Maner, 611 F.2d 107 at 112 (5th cir. 1980).

This was also established in the seventh circuits ruling in U.S. v. Shively, 715 F.2d 260 (7th cir. 1983). This case was reversed by Circuit Judge Cudahy, Circuit Judge Posner and Senior Circuit Judge Rosenn for producing an FDIC certificate without testimony from bank officers stating that it was in effect on the day of the offense.
In U.S. v. Trice, 823 F.2d 80 (5th Cir. 1987) citing U.S. v. Maner, 611 F.2d 107 (5th Cir. 1980):

> We have written that "one simple method of proof would be to introduce the certificate of insurance issued by the [appropriate federal agency], the contract of insurance between the bank and the [federal agency], and the canceled check [for the federal insurance premiums] for the period of time covering the

> [time of the offense]." Maner, supra, at 112 n. 2. Although we have held insufficient proof based solely on a certificate of federal insurance issued seven years before the offense, see Platenburg, supra, at 800, we have accepted - beit with reluctance - as barely sufficient an FSLIC certificate demonstrating pre-offense coverage together with the testimony of bank officials that such coverage was in effect when the offense occurred, id. at 799 & n.2.

In U.S. v. Platenburg, 657 F.2d 797 (5th cir. 1981) "The government must prove beyond a reasonable doubt that the bank was insured by FDIC at the time the charged criminal acts occurred. Failure to do so dismissed the indictment and reverses the conviction" Burks v. U.S., 437 US 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978). In Platenburg supra a 7 year old FDIC certificate was introduced into evidence by stipulation between the government counsel and defense counsel. In the instant case exhibit 21 was introduced by the government with no objection but there was no mention that the document was an FDIC certificate.

In the present case, the government stated that it was offering evidences as "proof of the element that at all times relevant to this case the First State Bank of Morgantown was, in fact, a Bank whose deposits were insured by the Federal Deposit Insurance Corporation."

(from trial tr.) The "Evidence" was a 22 year old FDIC certificate and there was no mention that it was an FDIC Certificate. The governments statement was false information to the jury and the indictment did not state FDIC insurance.

In U.S. v. James, 987 F.2d 648 (9th cir. 1993), "Because the government has failed to present any evidence on an essential element of the crime, we can only conclude that there was insufficient evidence to support the conviction." Reversed.

The President of the Bank, Dean Hawkins, testified about FDIC examiners auditing the bank after 1992 when he began his position with the bank. He was not asked if the bank was FDIC insured at the time of the offenses and he was not even working at the bank at this time. In fact, a letter was sent to Judge Tinder from the regional counsel for the FDIC, stating that "no FDIC examinations of First State Bank, Morgantown, Indiana were conducted in the years 1989, 1990 or 1991."

Patricia Weaver, a bank employee, was questioned on UCC filings for equipment and was led into mentioning FDIC, but did not state and had no knowledge that the bank was FDIC insured at the time of the offenses.

The testimony of Dean Hawkins and Patricia Weaver and other jurisdictional "evidence" is paralleled in the following portion of Judge John R. Brown's opinion in U.S. v. McClelland, 868 F.2d 704 (5th Cir. 1989).

Although I wonder why the government thought it had to drag this obviously run-of-the-mill Fort Worth crime case into the Federal Court, I agree with the court that the conviction for bank fraud was fully supported if - and the if is a very big one - the defrauded bank was a "federally...insured financial institution." 18 U.S.C. Sec. 1344 (a)(1).

On this critically decisive, constitutionally indispensable issue calling for proof beyond a reasonable doubt, the only evidence was that referred to in the court's opinion from a vice-president and loan officer to the bank who testified, without objection, that at all times during the period the bank was insured by FDIC. Although his descriptive title as "vice-president" may have given him a status above, say, a custodial janitor, there is not a stitch of evidence as to either his authority or his knowledge, including that of any knowledge or reason to know of the maintainance by the bank of a status as an insured institution under FDIC.

This is another instance, of which there are too many, in

> which this court - although with apologies which seem to salve the collective conscience - accepts little or no real evidence of this critical insured status. Not that we don't apologize for it, or more important, demand some improvement. Rather, it is our recognition that what we say is not heeded by prosecutors who are continuously replaced and who, not looking in the books know nothing of this message we have so long sounded at the expense of published volumes of the Federal Reporter.
>
> Since seldom - as would be true in this case - the problem is really not en banc - worthy, my only recourse is, as a single voice, to speak out as one claiming the exercise of the supervisory power of the court, to lament the indifference of prosecutors to what we say and, because of this, the necessity for the court finally to take action in a way which will assuredly attract their attention.

ASUA Warden's closing statement (taken from trial tr.) included "you have and we didn't talk a lot of time about this, but you have seen proof, it is in evidence, that this bank is insured by the FDIC. That is what matters. This is a federal crime." This was false

testimony to the jury, and as stated in Judge Tinder's jury instructions, should have been disregarded by the jury.

The insured status was not a part of appellant's trial defense. Attorney Keifer in his closing statement, stated that the bank may have been renewing loans to avoid showing bad debts on FDIC reports and Mr. Hawkins testified that the FDIC made the bank write off "A bunch of loans" in April 1992. Closing statements are not to be regarded by the jury as evidence. Attorney Keifer also inserted FDIC when questioning his own witnesses apparently to help the prosecution win its case. This is just an example of Keifer's ineffectiveness. It in no way proves FDIC insurance at the time of the offenses. Appellant did not know until researching facts after being incarcerated that the District Court lacked jurisdiction in his conviction.

The following is a portion of Judge Posner's dissenting opinion from the 7th circuit case U.S. v. Knop, 701 F.2d 670 (7th Cir. 1983).

> **...Although it is likely that the banks were federally insured in May 1979, this was not proved beyond a reasonable doubt. The government in its brief asked us to take judicial notice that the banks were insured but did not tell us what facts establishing insured status we should take judicial notice of. It is true that the banks are, and on the date of the alleged false statements**

were, national banks, and as such required to be federally insured, see 12 U.S.C. Secs. 1814(b), 1818, and I am willing to assume that national banks are generally law abiding. But one cannot infer - at least with the confidence required in a criminal case - from the fact that someone is required by law to do something that he has done it; 12 C.F.R. Sec. 303.7, which specifies procedures by which a bank that has lost insured status can regain it, implies - what is anyway obvious - that deposit insurance can lapse. ...

My brethren must share some of my misgivings about the sufficiency of the evidence that the banks were insured at the time of the alleged offense, because they say that unless the government shapes up, they may direct acquittal in a future case. But either the government proved every element of the offense beyond a reasonable doubt or it did not. If it did not, we must reverse; if it did, it is no business of ours that it could have put on an even stronger case.

If the government needed a warning, it got it three years ago in United States v. Maner, 611 F.2d 107, 112 (5th Cir.

> 1980) ("the Government treads perilously close to reversal in this case, and may soon find itself crossing the line from sufficiency to insufficiency .... [T]his is a nationwide plague infecting United States Attorneys throughout the land"). The warning was not heeded, and acquittal was directed to Platenburg - two years ago. I would have thought the Justice Department would keep its attorneys in Illinois abreast of rulings in other circuits. This is not our function. I would reverse.

ARGUMENT ON DEFECTIVE INDICTMENT

Appellant's superseding indictment was defective for it failed to set forth the jurisdictional elements of the crime charged, specifically by not stating that the First State Bank of Morgantown was FDIC insured. See Russell v. U.S., 369 U.S. 749, 82 S.Ct. 1038, 8 L.ed.2d 1962) "An indictment which fails to allege an essential element of the offense is fatal and cannot be cured by an allegation that the acts charged were done 'in violation of' the statute." This is exactly on point with appellants case.

Judge Manion's opinion in the Appellant's November 4, 1998 denial stated "While the indictment could have been drafted with greater specificity, it

did state that a "financial institution" was defrauded. For purposes of Title 18, these terms include a bank insured by the FDIC. See 18 U.S.C. Sect. 20 (1). By tracking the statute, the indictment properly alleged the elements of a violation of 18 U.S.C. Sect. 1344. The constitution requires no more than this." This is an incorrect assumption. Title 18 U.S.C. Sect. 20 defines "financial institution" as "an insured depository institution" and refers readers to 12 U.S.C. Sect. 1813 (c) (2). Section 1813 (c) (2) defines " insured depository institution" as any bank or savings association whose deposits are insured by the FDIC. FDIC insured is omitted from appellants indictment, therefore, it is fatally defective.

United States v. Cox, 285 F.Supp. 367 (1968) is on point in reference to language in appellants defective indictment.

Every essential element of an offense must be charged in the body of an indictment, and the inclusion or a reference to the statute will not cure the failure to do so. See: U.S. v. Hooker, 841 F2d at 1227,28.

The government cannot cure through subsequent amendment of an indictment presented by the grand jury that to allege each essential element because there is no assurance that the grand jury considered and found each essential element. See Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). As in the instant case, each count in the indictment, the government did not include the required statutory language, and the court did not address the issue

properly, by statutory law. It deprived the appellant of his rights and denied the court the jurisdiction to prosecute, U.S. v. Cina, 699 F.2d 853 (7th cir. 1983). Also see U.S. v. Wabaunsee, 528 F.2d 1 (7th cir. 1975). "Failure to allege essential element of offense in indictment could not be cured by a citation of appropriate statute."

The supreme court has consistently exhorted to its lower courts that a conviction under these same circumstances, offends the most basic denial of due process; Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 2 L.Ed.2d 321; Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22L.Ed.2d 134; Dunn V. U.S., 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743; Eaton V. Tulsa, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693.

During trial Judge Tinder read jury instruction 20 stating the bank was FDIC insured. No where in the indictment does it state that the Bank was FDIC insured. Russell v. U.S., 369 U.S. 749 (1962). Such an alteration called a "constructive amendment," requires automatic reversal and dismissal, Ex Parte Bain, 121 U.S. 1 (1887). U.S. v. Delano, 55 F.3d 720 (2nd cir. 1995) constructive amendments of indictment are per se violations of the fifth amendment that requires reversal even without showing of prejudice; U.S. v. Leahy, 82 F.3d 6224 (5th cir. 1996); if jury instruction constructively amends indictment, court of appeals must reverse conviction. U.S. v. Keller, 916 F.2d 628 (11th cir. 1990).

ARGUMENT ON INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant's trial counsel was ineffective as per standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), and in addition, Richard Keifer did not simply waive appellant's right to a speedy trial. He forged his signature on the motion, then lied in court at the hearing, stating appellant could not appear due to transportation problems. The instances are too numerous to list in this petition but they have been previously brought before this court.

ARGUMENT ON EVIDENTIARY HEARING

The district court erred in failing to hold an evidentiary hearing. The court nor the prosecution can vouch for what transpired and a hearing is required for the court to be able to review the issues. U.S. v. Moscony, 927 F.2d 748 (3rd cir. 1991); U.S. v. Fortna, 796 F.2d 725 (5th cir. 1996) n.3... If the defendant avers fails which are true and would be relevant to any issue in the case, a hearing should be granted unless the averments are failely incredible... Also see Barry v. U.S., 528 F.2d 1094, 1101 (7th cir.) "The affidavits supports the allegations beyond mere unsupported assertions

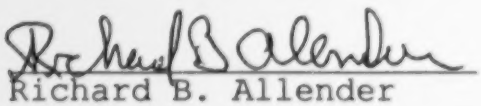
CONCLUSION

For the foregoing reasons, Petitioner prays that this Petition for Writ of Certiorari will be granted, and

the Petitioner respectfully requests the judgment of the District Court should be reversed and the case remanded with instructions that the District Court grant a Judgment of Acquittal. See Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed 2d 1 (1978).

Dated this 16th day of June 1999

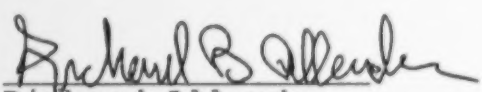
Respectfully Submitted,



Richard B. Allender
pro se

CERTIFICATE OF SERVICE

This is to certify that I have served 2 copies of the foregoing Appellant's Reply Brief, by mailing a copy thereof by first class mail to James M. Warden, United States Attorney, Office of the United States Attorney, 5Th floor, United States Courthouse, 46 East Ohio Street, Indianapolis, Indiana 46204,and to the Solicitor General of the united States Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W.,Washington, D. C. 20530. on this 16th day of June 1998.



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